

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

RAFAEL PAHUA NEPOMUSENO,	)	No. CR-F-02-5174 REC
	)	
	)	ORDER DENYING PETITIONER'S
Petitioner,	)	MOTION FOR A DOWNWARD
	)	DEPARTURE PURSUANT TO
	)	U.S.S.G. 5K2
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	
	)	
	)	

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On April 15, 2005, Rafael Pahua Nepomuseno filed a motion for a downward departure pursuant to U.S.S.G. § 5K2.

Petitioner pleaded guilty to being a deported alien found in the United States in violation of 8 U.S.C. § 1326. On May 6, 2003, petitioner was sentenced to 58 months in custody. No appeal was filed. On January 9, 2004, petitioner filed a motion for reduction of sentence pursuant to 28 U.S.C. § 2255, arguing that he was denied the effective assistance of counsel because of counsel's failure to argue the issue of his deportability

1 resulting in his ineligibility for various programs as a  
2 mitigating factor justifying a downward departure at sentencing,  
3 that the disparate sentences that result between alien and  
4 American inmates is a denial of equal protection, and that his  
5 guilty plea was not knowing and voluntary because of counsel's  
6 alleged advice that petitioner would be deported immediately upon  
7 pleading guilty. The court denied petitioner's Section 2255  
8 motion by Order filed on January 20, 2004. No appeal was filed.

9 In the instant motion, petitioner moves the court to grant a  
10 one year downward departure in his sentence pursuant to U.S.S.G.  
11 § 5K2 because of petitioner's "extraordinary efforts in his Post  
12 conviction Rehabilitation" and because of "his status as a  
13 Deportable Alien".

14 The court hereby denies petitioner's motion.

15 Neither Rule 35, Federal Rules of Criminal Procedure, nor 18  
16 U.S.C. § 3582 authorize a reduction in petitioner's sentence for  
17 the grounds stated by petitioner.

18 The court cannot deem petitioner's motion to be a motion for  
19 relief pursuant to Section 2255. Such a motion would be a second  
20 or successive Section 2255 motion and this court does not have  
21 jurisdiction to consider such a motion in the absence of  
22 authorization by the Ninth Circuit Court of Appeals. 28 U.S.C.  
23 §§ 2244(b) (3) and 2255.

24 The court cannot deem petitioner's motion to be a motion for  
25 relief pursuant to 28 U.S.C. § 2241 and allow petitioner to amend  
26 to state a claim under Section 2241 against the appropriate

1 respondent. Petitioner alleges that he has been denied equal  
2 protection of the laws by the Bureau of Prisons because the BOP  
3 refuses to give petitioner time credit for his successful  
4 completion of the drug rehabilitation program because of his  
5 status as a deportable alien. However, the Ninth Circuit has  
6 held that this refusal by the BOP does not deny equal protection.  
7 See McLean v. Crabtree, 173 F.3d 1176, 1185-1186 (9<sup>th</sup> Cir. 1999),  
8 cert. denied, 528 U.S. 1086 (2000). Consequently, any amendment  
9 by petitioner to state a claim for habeas relief under Section  
10 2241 would be futile.

11 ACCORDINGLY, petitioner's motion for a downward departure  
12 pursuant to U.S.S.G. § 5K2 is denied.

13 IT IS SO ORDERED.

14 **Dated: April 25, 2005**  
668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE